

AMOCO PRODUCTION CO.

IBLA 87-736, 87-754

Decided November 22, 1989

Appeals from decisions of the Director, Minerals Management Service, affirming orders requiring the payment of royalties on natural gas liquid products extracted from natural gas produced from various offshore oil and gas leases. MMS 86-0076-OCS and MMS 86-0054-OCS.

Affirmed in part, set aside in part, and remanded.

1. Administrative Procedure: Rulemaking--Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Outer Continental Shelf Lands Act: Oil and Gas Leases

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

2. Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Outer Continental Shelf Lands Act: Oil and Gas Leases

In accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, MMS will normally accept a non-arm's-length contract price for royalty purposes where the lessee can show that the non-arm's-length contract has characteristics similar to arm's-length contracts which represent fair market value. The fact that third party contracts include a deduction for marketing costs does not discredit the arm's-length nature of those contracts or establish that the price is not fair market value. Nevertheless, where that price reflects deductions that may not be made in determining value for Federal royalty purposes, such deductions may be added to the contract price to derive the value of production for royalty computation.

3. Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Outer Continental Shelf Lands Act: Oil and Gas Leases

Pursuant to 30 CFR 250.64 (1982), the value of production shall not be less than gross proceeds. Consequently, a lessee is not entitled to a credit for

87-736, 87-754

those months when its price for natural gas liquid products is above the yardstick range established by the Procedure Paper on Natural Gas Liquid Products Valuation offsetting those months when its price was below that range.

4. Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Outer Continental Shelf Lands Act: Oil and Gas Leases

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

5. Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Outer Continental Shelf Lands Act: Oil and Gas Leases

Where MMS utilizes spot market prices to determine the value of the production of ethane for royalty purposes and the lessee shows that during the period in question the price for the majority of ethane produced from the field or area was determined on the basis of quarterly contracts, not spot market prices, the lessee has established that MMS was not justified in using spot market prices for ethane.

6. Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Outer Continental Shelf Lands Act: Oil and Gas Leases

Pursuant to 30 CFR 250.67(d)(1982), no allowance is available for expenses incidental to marketing natural gas liquid products, and since a lessee has a duty to market its production, it must bear the expenses incurred in discharging that obligation.

APPEARANCES: Jack M. Wilhelm, Esq., and H. E. Weidlich, Esq., New Orleans, Louisiana, for appellant; Howard Chalker, Esq., Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Amoco Production Company (Amoco) has appealed from two decisions of the Director, Minerals Management Service (MMS), one dated June 25, 1987,

the other July 21, 1987, affirming the assessment of additional royalties of \$64,405.33 (MMS 86-0076-OCS) and \$385,916.76 (MMS 86-0054-OCS), respectively, for natural gas liquid products (NGLP's) extracted from gas produced from various offshore oil and gas leases held by Amoco. 1/

The additional assessments arose from audits conducted by the Office of Inspector General (OIG), U.S. Department of the Interior. The audit which resulted in the MMS assessment of \$64,405.33 covered the years 1978 through 1983 and pertained to the Yscloskey gas processing plant in Louisiana. OIG found that Amoco had improperly valued NGLP's from two Federal leases from January 1980 through June 1982, causing a royalty underpayment. Another audit, covering the years 1977 through 1983, for the North Terrebonne gas processing plant in Terrebonne Parish, Louisiana, resulted in the MMS assessment of \$385,916.76, based on OIG's finding that Amoco had underpaid royalties on 24 leases from January 1980 through December 1983 due to improper valuation of NGLP's.

In both cases, Amoco had transferred the NGLP's to Amoco Oil Company (Amoco Oil) pursuant to a contractual arrangement. 2/ In his decisions, the Director explained that Amoco's valuation of the NGLP's for the period January 1980 through June 1982 was based on the weighted average product price contained in Table 7 of the Department of Energy's (DOE) Petroleum Industry Monthly Report for Product Price. He stated further that from July 1982 through 1983, Amoco used individually developed settlement prices for valuation purposes. On the other hand, MMS based its valuation on spot market prices (herein, Mt. Belvieu) listed in certain commercially prepared price bulletins, in accordance with a document prepared by MMS, issued on December 14, 1984, and revised on February 25, 1985, entitled "Procedure Paper on Natural Gas Liquid Products Valuation" (Procedure Paper).

The Director, MMS, described the utilization of the Procedure Paper in the valuation of the NGLP's, as follows:

The purpose of this paper was to develop a yardstick for determining the reasonableness of reported royalty values for NGLP's.

In developing this yardstick, the RMP [Royalty Management Program] considered NGLP sales contracts, prices received by lessees, Department of Energy prices, and commercially available

1/ Amoco's appeals of MMS 86-0076-OCS and MMS 86-0054-OCS were docketed by the Board as IBLA 87-736 and IBLA 87-754, respectively. On Apr. 11, 1988, Amoco filed a motion for consolidation of the two cases; that motion is hereby granted.

2/ Both appellant and Amoco Oil Company are wholly owned by Amoco Corporation. A copy of the contract between the companies is contained in the record as Exhibit C to Amoco's Statement of Reasons filed with the Director, MMS, in MMS 86-0054-OCS. That Statement of Reasons and its Exhibits may also be found in the record as Exhibit C to Amoco's Statement of Reasons in IBLA 87-754.

NGLP Bulletins and concluded that commercial bulletins represented the best available price source (i.e., the most indicative of NGLP fair market value).

Under the procedure paper, [MMS] uses the highest and lowest published prices for the month from the appropriate bulletin to establish a yardstick to compare to the lessee's reported prices. If the reported value falls within this range (i.e., between the highest and lowest prices), the value will normally be accepted by RMP for royalty valuation purposes. If the prices used to calculate royalties fall below the range, a minimum value acceptable to RMP will be determined by developing an average value from the lowest and the highest prices in the range.

The paper provides several exceptions and qualifications to this practice. For example, the price received under a true arm's-length contract establishing an NGLP price will normally be accepted for royalty purposes. * * * Similarly, if a lessee has a non-arm's-length contract which established an NGLP price and the lessee can show that the contract has characteristics similar to arm's-length contracts which represent fair market value, MMS will normally accept the non-arm's-length contract price for royalty valuation purposes.

(Director's Decision of July 21, 1987, at 1-2). ^{3/} Appellant argues that MMS ignored the applicable regulations and applied the Procedure Paper as if it were a rule, despite the fact that it was not duly promulgated, thereby violating the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982).

[1] The applicable regulation in these cases provided:

The value of production shall never be less than the fair market value. The value used in the computation of royalty shall be determined by the Director. In establishing the value, the Director shall consider: (a) The highest price paid for a part or for a majority of like-quality products produced from the field or area; (b) the price received by the lessee; (c) posted prices; (d) regulated prices; and (e) other relevant matters. Under no circumstances shall the value of production be less than the

^{3/} The Procedure Paper identified the relevant time periods for its coverage as "1973 to January 1980 (February 1981 for propane) or the 'Control Period,'" when DOE price controls were effective, and "January 1980 (February 1981 for propane) to the present and prospectively, or the 'Decontrol Period,'" after NGLP price restrictions were lifted (Procedure Paper at 4). Since the maximum permissible price was the highest price a lessee could have received under the DOE regulations, MMS considered that price to be the fair market value for royalty purposes during the Control Period (Procedure Paper at 8). In this case, we are concerned with the Decontrol Period.

87-736, 87-754

gross proceeds accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

30 CFR 250.64 (1982). ^{4/}

The question raised by appellant is whether the Procedure Paper represents a departure from that regulation such that the rulemaking provisions of the APA should have been utilized by MMS. The notice and comment provisions of 5 U.S.C. § 553 (1982) apply to substantive rules, but not to interpretive rules or general statements of policy. Substantive rules create law or change existing policy, while interpretative rules and general policy statements clarify or explain policy. Aleknagik Natives, Ltd. v. United States, 635 F. Supp. 1477, 1496 (D. Alaska 1985), aff'd, 806 F.2d 924 (9th Cir. 1986); Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984); Conoco, Inc., 109 IBLA 89, 93 (1989); Venlease I, 99 IBLA 387, 389 (1987).

The regulation does not specify all of the factors which are to be considered, nor does it indicate the exact weight each of the factors is to be given. The regulation gives the Director, MMS, a great deal of discretion in establishing value for the purposes of computing royalty. See Marathon Oil Co. v. United States, 604 F. Supp. 1375, 1382 (D. Alaska 1985), aff'd, 807 F.2d 759 (9th Cir. 1986), cert. denied, 107 S. Ct. 1593 (1987); Texaco, Inc., 104 IBLA 304, 308 (1988). That discretion is tempered only by the standard of reasonableness. Id. at 310.

Appellant has failed to establish that MMS abandoned the relevant regulation in favor of the Procedure Paper. In fact, the Procedure Paper itself relies on the factors set forth in the regulation--the lessee's price, regulated prices, posted prices, and gross proceeds. It provides guidance by specifying which of the factors listed in 30 CFR 250.64 (1982) is to be given the most weight in various circumstances. Where there is a regulated price, that price will be accepted for royalty computation purposes. Where there is an arm's-length contract or a non-arm's-length contract with characteristics similar to arm's-length contracts which represent fair market value, MMS normally will accept the contract price, unless gross proceeds are higher. In the event that prices are not controlled and there is neither an arm's-length contract nor a non-arm's-length contract with characteristics similar to arm's-length contracts which represent fair market value, the price received by the lessee will still be given the most weight, unless it falls below the yardstick range established by the commercial price bulletins. Under those circumstances, the average of the prices in the commercial bulletins will be the minimum acceptable value.

^{4/} Although effective Aug. 5, 1983, this regulation was redesignated 30 CFR 206.150 (48 FR 35641 (Aug. 5, 1983)), its language remained unchanged during the time period involved in this case. However, effective Mar. 1, 1988, MMS completely revised its regulations relating to gas royalty valuation. 53 FR 1230 (Jan. 15, 1988).

By adopting the Procedure Paper, MMS did not change or create law, but simply interpreted and clarified the existing law. As we recently stated in Conoco, Inc., 110 IBLA 232, 242-43 (1989), in which we rejected a similar argument regarding the Procedure Paper:

The Procedure Paper merely clarified the existing regulations by setting forth a yardstick by which MMS would measure the reasonableness of royalty values reported by lessees. It did not require lessees to value their production by any specific method, nor did it modify any existing regulation. Rather, it found that, after consideration of the factors listed in the regulations, the best measurement of the reasonable value of NGLP in situations where no arm's-length contract existed was the commercially available spot price bulletins. We find the Procedure Paper to be essentially a policy guideline adopted by MMS to assist in valuing NGLP production for royalty purposes under the provisions of the relevant regulation. As such, it does not have the force and effect of law as a duly promulgated regulation does, and the Board will decline to follow it where it is inconsistent with the terms of the relevant regulations. [5/]

Consequently, the notice and comment provisions of 5 U.S.C. § 553 (1982) do not apply to the Procedure Paper.

[2] Appellant argues its contract with Amoco Oil is a non-arm's-length contract with characteristics similar to arm's-length contracts which represent fair market value, and that, therefore, pursuant to the Procedure Paper, its contract prices should be accepted for royalty valuation purposes. The question presented by this argument is not easily resolved.

The Director's ruling in his June 25, 1987, decision that Amoco's contract with Amoco Oil did not have the characteristics of arm's-length contracts appears to be based on the fact that the contract allowed a deduction for marketing costs. He stated:

Amoco deducted marketing costs in computing royalties and relied on arm's-length contracts using a similar methodology. However, marketing costs are specifically excluded as royalty deductions by the regulations (30 CFR § 206.152(d)). Thus Amoco's methodology was improper, and it cannot properly rely on the cited arm's-length contracts.

(Decision of June 25, 1987, at 4). In his July 21, 1987, decision at pages 4-6, the Director, MMS, rejected the same argument, apparently on the same basis.

5/ While the Procedure Paper does not have the force and effect of law and is not binding on this Board or outside parties, it is binding on MMS employees. See Phillips Petroleum Co., 109 IBLA 4, 9 (1989); Sierra Club, 61 IBLA 329, 334 (1982); Helen E. Serencha, 39 IBLA 318 (1979); Vernal E. Bess, 27 IBLA 4 (1976).

At page 3 of its answer to appellant's statement of reasons in IBLA 87-754, MMS summarily addresses this argument by stating that "Amoco did not provide any actual third-party arm's-length contracts with which to compare the contracts that are relevant to this dispute. Therefore, Amoco has not established that its contracts have the characteristics of arm's-length contracts, and it is Amoco's burden to establish such." It is not clear how this argument by MMS is responsive to appellant's contention, since the Director found that appellant had "relied on arm's length contracts using a similar methodology [*i.e.*, marketing cost deductions]." Such a finding by the Director would indicate that he had examined the arm's-length contracts relied on by Amoco, and, in fact, the record shows that documents pertaining to an agreement between Amoco and Warren Petroleum Company, submitted to the Director as Exhibit D attached to Amoco's Statement of Reasons in MMS 86-0054-OCS, were represented by Amoco as constituting an arm's-length contract between Amoco and a third party purchaser of NGLP's.

In addition, in response to MMS' answers in these cases, appellant argued:

During the fall of 1987, Amoco prepared its Memorandum on NGL Pricing - Amoco Production Company and Third Party Producer Transactions (Study). The Study conclusively shows that Amoco Production Company's NGLP sales contract with Amoco Oil Company has all the characteristics of comparable arm's-length contracts and that the prices Amoco Production Company receives for its NGLPs track closely the prices Amoco Oil Company pays for NGLPs purchased from third-party producers. A copy of the Study, complete with its exhibits and explanatory affidavit of D. P. Bowman, is attached to this reply and is identified as Exhibit "A".

The study shows that in most cases Amoco Oil Company paid more for Amoco Production Company's NGLPs than it did for NGLPs produced by third-parties. The Study also shows that the Amoco Production's contract contains terms and conditions similar to those contracts between nonaffiliated NGLP sellers and buyers.

(Reply to MMS' Answers at 3). MMS has not come forward to dispute these assertions made by appellant.

In the Study, Amoco states that the same basic methodology for determining NGLP prices was used for its transactions with Amoco Oil as with third parties. It stated that the transaction price equaled the major market price less costs for transportation, fractionation, and marketing. Amoco explained that its major market price was derived by checking the "published spot market price for the area (Mt. Belvieu, Texas or Conway, Kansas)" and taking the average of those prices for the month, while the major market price for third parties represented the "price for a day (or days) at the BEGINNING of each month." (Emphasis in original; Reply to MMS' Answers, Exh. 4 at 4.)

Amoco's explanation of its methodology is not consistent with statements in the Director's decisions that from January 1980 through June 1982, Amoco relied on DOE Table 7 prices. It is possible that after June 1982, Amoco determined prices as set forth in Exhibit A of its Reply. That is not made clear in the record. What is clear is that Amoco deducted marketing costs in deriving a transaction price. However, the fact that third party contracts included a deduction for marketing costs does not discredit the arm's-length nature of those contracts or establish that the price is not fair market value. In accordance with the Procedure Paper, MMS will normally accept the non-arm's-length contract price for royalty purposes where the contract has characteristics similar to arm's-length contracts which represent fair market value. Clearly, however, where that price reflects deductions that may not be made in determining value for Federal royalty purposes, such deductions may be added to the contract price to derive the value of production for royalty computation.

For the reasons stated, we find no support for the apparent basis for MMS' rejection of Amoco's claim that its non-arm's-length contract with Amoco Oil has characteristics similar to its arm's-length contracts with third parties which represent fair market value. Accordingly, we set aside the Director's decisions on that basis and remand for reexamination of that issue. 6/

[3] Next, we turn to appellant's argument that for the months that its price was above the Procedure Paper yardstick range, it should be given a credit offsetting those months when its price was below the range. 7/

6/ The MMS demand letter to Amoco dated Dec. 31, 1985, included as Exhibit B to Amoco's Statement of Reasons to the Director, MMS, in MMS 86-0054-OCS, explained that because Amoco disposed of the NGLP's through non-arm's-length transactions, "OIG, therefore, applied the procedures set out in the procedure paper" by comparing "Amoco's unit prices to the lowest Mont Beliveu spot prices as directed by the procedure paper." The demand letter gives no indication that OIG gave any consideration to whether or not Amoco's non-arm's-length contract with Amoco Oil had characteristics similar to arm's-length contracts.

7/ In support of its argument, appellant refers us to American Telephone & Telegraph Co. v. Federal Communications Commission, 836 F.2d 1386 (D.C. Cir. 1988). Therein, the Federal Communications Commission had set a carrier's target rate of return at what it considered the minimum necessary to retain and attract sufficient investors. The Commission's rule required refunds to consumers for periods when the rate of return was higher than the target, but disallowed credits for periods when the rate of return was lower. The court held this rule was inconsistent with the Commission's own theory of ratemaking because, over the long run, the refund policy would virtually guarantee that the rate of return would be less than the minimum required.

However, in this case disallowing offsets for months when the contract price was greater than the yardstick range has not been demonstrated to be inconsistent with any Departmental policy, whereas adoption of the offset suggested by Amoco would be inconsistent with the applicable regulation, as discussed infra.

Amoco's argument has no merit. Pursuant to 30 CFR 250.64 (1982), "Under no circumstances shall the value of production be less than the gross proceeds accruing to the lessee from the disposition of the produced substances * * *." See Supron Energy Corp., 46 IBLA 181, 188 (1980), appeal pending sub nom., Conoco v. Andrus, No. 80-0261-M (D. N.M. filed Apr. 17, 1980). If appellant were to offset valuations in the manner suggested, it would effectively be paying royalty on less than gross proceeds. Moreover, the payment of royalties based on the gross proceeds accruing to a lessee, even when the sales price is greater than the yardstick, cannot constitute an overpayment. Therefore, there is absolutely no basis for an offset.

[4] Amoco further maintains that because the Procedure Paper recommends the acceptance of any contract price within the yardstick range, when a lessee's price falls below that range, the value applied should be the lowest price in the range, not the average, as called for by the Procedure Paper. The Board recently accepted this argument in Conoco, Inc., 110 IBLA at 244, where we stated:

[I]n the present case a price falling below the floor value is raised not to the floor value, but to a price computed by averaging the floor value with the high spot market price, in effect making the average the floor value. We find that the acceptance of any settlement price within the range of the low to the high spot market price as constituting fair market value is inconsistent with requiring payment of the average spot market price where lessee's settlement price is less than the floor value. While the obligation of MMS to value production at no less than the gross proceeds realized by the lessee may lead to a valuation in excess of the fair market value/floor value where this is reflective of proceeds received by the lessee, the fair market value is the standard at issue in this case where the NGLP were used internally and not marketed. If the average spot market price rather than the floor price constituted fair market value, then MMS would be without authority under the statute and regulation to accept royalty settlement prices as low as the floor price as the Procedure Paper indicates MMS has done.

We find that MMS erred in utilizing the average of the high and low prices within the yardstick range when the prices used by Amoco during the periods in question fell below the yardstick minimum. The yardstick minimum should have been the price employed for computing additional royalties. Accordingly, we must set aside the Director's decision to the extent it affirmed using the average spot market price where Amoco's price fell below the yardstick value. ^{8/}

[5] Appellant also contends that for ethane, it was erroneous and unreasonable for MMS to use the Mt. Belvieu spot price for royalty

^{8/} Amoco asserts in its Statement of Reasons in IBLA 87-754 at pages 17-18 that if royalties were recomputed in that case using the yardstick minimum where its prices fell below that amount, rather than the yardstick average, its royalty liability would be reduced, according to its calculations, from \$385,916.76 to \$232,635.82.

valuation in these cases. It asserts that during the audit period 90 percent of all ethane sales in the United States were based on quarterly contracts and that by applying the Mt. Belvieu spot market price, MMS effectively ignored prices for the majority of like-quality products produced from the field or area. Amoco argues that its "settlement prices for ethane in Louisiana were based on the volume weighted average of all arm's-length transactions between Amoco and third-parties in the Louisiana market area. The ethane prices were determined and used for settlement on a quarterly basis consistent with industry practice." (Emphasis in original; Statement of Reasons in IBLA 87-754 at 11.)

The ethane argument was presented in each of Amoco's appeals to the Director, MMS, yet in the two decisions under review, he addressed it only in the June 25, 1987, decision concerning royalties from the NGLP's extracted at the Yscloskey gas processing plant, and then only tangentially, when he stated at page 4:

While Amoco emphasizes that ethane transactions occur on a quarterly basis, since October 1982 Amoco has used the Oil Price Information Service weekly spot price for the preceding month as "the area market price."

In that case, however, the additional royalty assessment related to the period January 1980 through June 1982. Thus, the relevancy of the Director's response to that case is questionable.

In its answer in IBLA 87-754, MMS argues that Amoco failed to show that it was erroneous to use Mt. Belvieu prices to value ethane because Amoco did not provide any arm's-length contracts from the market area to show consistency with its prices and it also subtracted its marketing costs from the base price to arrive at royalty value. MMS maintains that ethane prices based on quarterly data "might not represent current market prices," while spot prices would. (Answer in IBLA 87-754 at 12).

Where a party challenges a determination as to the value of gas produced, the party must establish that the methodology used is erroneous. Sun Exploration & Production Co., 104 IBLA 178 (1988); Amoco Production Co., 78 IBLA 93 (1983). Amoco has established that MMS erred by utilizing spot prices for ethane for the period from January 1980 through September 1982. ^{9/} While, under 30 CFR 250.64 (1982), the Director has discretion regarding the relative weight the various factors should receive, the present record indicates that during that period the majority of ethane sales were not governed by spot prices. Thus, MMS was not justified in using them. That does not mean, however, that MMS is required to accept Amoco's royalty payments based on Amoco's contract prices. MMS' arguments indicate that certain adjustments might be required. Therefore, on remand, MMS should recompute appropriate ethane royalties utilizing quarterly contract prices with any necessary adjustments.

^{9/} The claim in the Director's June 25, 1987, decision that Amoco began using spot prices in October 1982 has not been directly disputed by Amoco and, in fact, as noted above, in Exhibit A to the Reply to MMS' Answers, Amoco stated that it utilized spot market prices.

[6] Appellant also argues that it should be entitled to a reason-able allowance for its marketing costs. Despite the fact that 30 CFR 250.67(d) (1982) provides, "No allowance shall be made for boosting resi-due gas or other expenses incidental to marketing," Amoco argues that of the costs that it designates as marketing costs--overhead, storage, stock loss, inventory, receivables, and equipment--only those expenses it labels "overhead," *i.e.*, "traders, planners, accounting, etc.," would be excludable under the regulation. It further contends that in this case all of its marketing costs, including overhead, should be deductible because Mt. Belvieu spot prices are being utilized to value the production.

The relevant regulation cited above is controlling. Appellant has provided no authority for excluding any of the listed expenses. It does not claim that any of them fall within the categories of excludable transportation or processing allowances. It is well established that the lessee has a duty to market its production, and it must bear the expenses incurred in discharging that obligation. *See California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961); *The Texas Co.*, 64 I.D. 76 (1957). Moreover, we note that under sections 6.1 and 6.2 of Amoco's contract with Amoco Oil, delivery is made by Amoco to Amoco Oil at the gas processing plant and title to the NGLP's passes at that point.

Appellant asserts that it is being penalized for using DOE Table 7 prices during a period when the commercial price bulletins, which MMS ultimately utilized for valuation, were new and unproven. Amoco contends that it would have been imprudent to use the new commercial price bulletins until it had completed its analysis and evaluation of the bulletins.

There is no penalty involved in these cases. Amoco is not being required to pay a penalty but is simply being assessed royalty on the fair market value of the NGLP's, as established by the Director pursuant to the applicable leases and regulations. The fact that appellant did not, for whatever reasons, calculate royalties using the same methodology MMS eventually used does not turn an assessment for underpayment of royalties into a penalty.

Amoco alleges that the Director failed to follow the procedures set forth in proposed regulations governing valuation of gas. That argument has no merit. The valuation regulations referred to by Amoco were finalized, effective March 1, 1988 (53 FR 1184 (Jan. 15, 1988)). However, those regulations "apply prospectively to production on or after" March 1, 1988 (53 FR 1184 (Jan. 15, 1988)), and, thus, have no applicability to the relevant time period involved in this case.

Appellant next complains that assessment of the subject royalties violates the three year Louisiana statute of limitations which prevents MMS from collecting royalties which were due prior to December 31, 1982. Amoco bases this argument on 43 U.S.C. § 1333(a)(2)(A) (1982), which provides in relevant part:

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the

87-736, 87-754

Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State * * * are hereby declared to be the law of the United States * * *.

Without a clear manifestation of congressional intent, the United States is not bound by state statutes of limitations. Cassidy Commission Co. v. United States, 387 F.2d 875, 880 (10th Cir. 1967). The statute which appellant cites, 43 U.S.C. § 1333(a)(2)(A) (1982), is certainly not a clear manifestation of congressional intent to be bound by the state statute of limitations. Rather, it provides that a state statute is not applicable where it is inconsistent with Federal laws or regulations. In this case, there is a statute of limitations, 28 U.S.C. § 2415(a) (1982), which allows 6 years for the United States to file action for money damages based on contracts. See Forest Oil Corp., 111 IBLA 284 (1989).

In summary, we set aside the Director's decisions to the extent they (1) rejected Amoco's argument that its contract with Amoco Oil is a non-arm's-length contract with characteristics similar to arm's-length contracts which represent fair market value; (2) affirmed using the average spot market price where Amoco's price fell below the yardstick value; and (3) affirmed the utilization of spot market prices for ethane for the period from January 1980 through September 1982. In all other respects, we affirm the Director's decisions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Director's decisions of June 25 and July 21, 1987, are affirmed in part and set aside in part, and the cases are remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

I concur:

Charles B. Cates, Director
Ex Officio Member